Best Lock Corporation *and* Rush Addair. Case 25–CA–20371

November 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 24 and May 31, 1991, Administrative Law Judge Elbert D. Gadsden issued the attached decision and correction, respectively. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, as corrected, and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order.

The Respondent moved to dismiss the complaint in its entirety on the ground that the General Counsel's failure to consolidate this case with an earlier unfair labor practice proceeding (Case 25–CA–19645) (the Gipe case) against the Respondent subjected it to the unnecessary harassment of a separate hearing in the instant case, citing *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961). The judge denied the motion because he found, inter alia, that the General Counsel's decision (not to seek postponement of the Gipe case) was a legitimate exercise of discretion and because no charge by Addair had been filed at that time.

The Respondent excepts to the judge's reliance on the absence of a filed charge. It argues that there was no charge because the General Counsel discouraged Addair from filing his charge. The Respondent has also submitted a transcript excerpt from the Gipe case in an attempt to show that the refusal-to-post allegation in this case is closely related to the issues litigated there[2] We find no merit in the Respondent's exceptions for the following reasons.

The evidence on this record establishes that after giving testimony in Gipe's case on December 5, 1989, Addair informed counsel for the General Counsel that he planned to file a charge against the Respondent and asked if he could do so at that time. Addair did not indicate the substance of the charge. The General Counsel told Addair not to do so because it could cause postponement of the Gipe proceeding for investigation of Addair's charge and the amendment of the Gipe complaint. In an off-the-record discussion on December 5, the General Counsel reported her conversation with Addair to the judge and the Respondent. The judge advised counsel for the General Counsel to ''do what you have to do.'' The General Counsel elected not to postpone the hearing or seek to amend the complaint; the hearing resumed and closed on December 6, 1989; and Addair filed the instant charge on January 22, 1990.

We find that the General Counsel's conduct was not prejudicial to the Respondent. As the judge noted, whether to seek a postponement of an ongoing proceeding in order to investigate new charges which may or may not be related to it is a matter within the discretion of the General Counsel or the Regional Director[3] Concededly, if the General Counsel or Regional Director chooses not to seek a postponement and chooses instead to litigate the new allegations in a separate case in the future, the Board has the power to refuse to permit this, i.e., the Board can dismiss the second case under the authority of *Peyton Packing*, supra. However, the circumstances of the instant case do not warrant a dismissal under Peyton Packing. In that regard, contrary to the Respondent's contention, it is manifest that these cases do not involve issues so closely related as to mandate consolidation. In the instant case, the Respondent is charged, inter alia, with refusing to post union literature on employee bulletin boards[4] Gipe's case involved his discharge for engaging in concerted or union activities or for testifying in a Board proceeding. Gipe's quoted testimony was adduced in connection with the issue of whether the Respondent had knowledge of his union activities. There was no refusal-to-post allegation alleged in the complaint or litigated in that case, and his testimony was in no way addressed to such an issue. Further, the discharge in the prior case occurred on June 10, 1988, and the unlawful conduct in the instant case occurred in October 1989.[5]

We further find that the General Counsel did not preclude Addair from filing a charge or attempt to con-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Gipe testified as follows:

> The other pieces [of union literature] I showed to [supervisor] Scott Walker because he had some questions concerning the union. I showed him what we had at the time. I had shown them to [supervisor] Brian Oertel because I asked Brian if we could post some of the stuff on the bulletin board, because it is very common for employees of Best Lock to post some of their hobbies, or church functions or things of this nature, things that interest them.

[3] *Harrison Steel Castings Co.*, 255 NLRB 1426, 1427 (1981).

[4] All other allegations, which in essence alleged that Addair was issued a discriminatory warning under the pretext of his making a negative ethnic remark to another employee, were dismissed by the judge. No exceptions were filed to those dismissals.

[5] See *Maremont Corp.*, 249 NLRB 216, 217 (1980), in which the Board, in permitting the second complaint, noted a 6-month hiatus between the last incident in the first case and the conduct in the second case.

ceal Addair's prospective charge. Rather, counsel for the General Counsel promptly notified the Respondent and the judge of Addair's intention. The Respondent does not contend that it protested the General Counsel's conduct at that time. Nor did it seek to interpose any objection to such conduct on the record. Moreover, even if Addair had filed a charge before the hearing closed the next day, it would not have been an abuse of discretion if the General Counsel or the Regional Director did not seek postponement of the proceeding to investigate the new charge.[6] We note in this connection that the charge would have been filed by a different charging party on the last day of the hearing; it would have involved new and unrelated issues; and its merits would not have been readily ascertainable so as to permit the complaint to be amended without undue delay.

Accordingly, we find no basis on the record for reversing the judge's ruling on the Respondent's motion to dismiss the instant complaint. We shall therefore adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Best Lock Corporation, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] Cf. *Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078 at fn. 1 (1990).

Steve Robles, Esq., for the General Counsel.
Jack H. Rogers, Esq. and *Clare M. Sproule, Esq. (Barnes and Thornburg)* and *Greg Dykstra, Esq.*, of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A charge of unfair labor practice conduct was filed January 22, 1990, by Rush Addair, an individual (the Charging Party), against Best Lock Corporation (the Respondent). Based on the charge and on behalf of the General Counsel, the Regional Director for Region 7 issued a complaint on March 30, 1990.

In essence, the complaint alleges that since July 22, 1989, the Respondent has maintained a rule forbidding employees from using the employees' bulletin board for the posting of concerted activity concerns of employees, in violation of Section 8(a)(1) of the Act; and that Respondent has enforced the rule by issuing an unwarranted warning and discipline to an employee, threatening him with further disciplinary action, including discharge, thereby discriminating against the employee, in violation of Section 8(a)(1) and (3) of the Act.

The Respondent filed an answer to the complaint on April 5, 1990, admitting it maintained the rule prohibiting use of the employees' bulletin board for employees to post notices concerning employees, but it denies it maintained and enforced the rule to undermine or discourage the employees from engaging in concerted activities.

Affirmative Defense

Respondent affirmatively alleges in its answer that the complaint should be dismissed in its entirety because the Board has held that all outstanding charges of violations of the Act involving the same Respondent should be litigated in a single hearing, to avoid ''unnecessary harassment of Respondents.'' *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961).

The hearing in the above matter was held before me in Indianapolis, Indiana, on August 27, 1990. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this proceeding, including my observation of the demeanor of the witnesses and my consideration of all the evidence, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material, an Indiana corporation.

At all times material, during the past 12 months, the Respondent, in the course and conduct of its business operations, sold and shipped from its Indiana facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Indiana.

The complaint alleges, the answer admits, and I find that Respondent is now, and has been at all times material, an employer engaged commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

At its Indiana facility, the Respondent is engaged in the manufacture, sale, and distribution of extruded locks and related products. It employs 700 employees who work in a 1500 square feet plant area on three different shifts in 25 departments. Since its corporate existence in 1938, Respondent's employees have never been represented by a Union.

At all times material, the following named persons occupied the positions set opposite their respective names and are now, and have been at all times material, supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Walter Best—President
Gene McCullem—Vice President
Scott Walker—Supervisor

William Remmington—Director, Human Resources
Dave Whittmoyer—Chief Engineer
Estelle Clarkson—Supervisor

The parties stipulated that since February 1987, the Respondent has known that the Charging Party, Rush Addair, actively participated in the union activities.[1]

B. *Respondent's Motion to Dismiss*

Having set forth an affirmative defense in its answer to the complaint, Respondent reasserted its affirmative defense at the commencement of the hearing accompanied by a motion to dismiss the complaint in its entirety.

Respondent contends the allegations raised in the current complaint were known by the General Counsel prior to the close of an unfair labor practice proceeding held December 5 and 6, 1989, on related issues against the Respondent. Counsel for the Respondent argued that the Board has held that the General Counsel must litigate all outstanding charges of violations of the Act against the same Respondent in a single proceeding. As set forth in *Peyton Packing Co*., supra, the Board said:

> Generally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that, whenever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondents. *NLRB v. Thompson Products*, 130 F.2d 363, 366–367 (6th Cir. 1942), and *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955).

More specifically, the Respondent argues that in the prior proceeding between Respondent and Thomas Gipe, Case 25–CA–19645, the Respondent defended itself against charges that it violated Section 8(a)(1), (3), and (4) of the Act. Paragraph 6 of the complaint in that proceeding alleged:

> By the facts and conduct described above in subparagraphs 5(a) and (b) and by each of said facts, the Respondent has discriminated, and is discriminating, in regard to the higher or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent hereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

Just prior to the close of the hearing on December 5, 1989, counsel for the General Counsel, Ann Rybolt, off the record, indisputably informed Judge Stephen J. Gross and counsel for Respondent, Jack H. Rogers and Clare M. Sproule, that she had just been informed that employee Rush Addair had planned to file charges against Respondent for company actions that occurred prior to the hearing. Addair had asked General Counsel could he file the charges in the current complaint in the case then before Judge Gross on December 5, 1989, because he was in Indianapolis as a witness at the time. Counsel for the General Counsel told Addair not to file the charges, that such possible charges could or would affect the litigation in the Gipe case, possibly causing it to be continued for investigation and to amend the complaint. Judge Gross told counsel for the General Counsel that she should do whatever she had to do and she elected not to amend the complaint in the December 5 proceeding (Case 25–CA–19649). The Gipe hearing proceeded forwarded and was closed on December 6, 1989.

Counsel for the General Counsel's Argument

Counsel for the General Counsel argues that during the December 5 hearing in the Gipe case, Addair told counsel for the General Counsel, Ann Rybolt, that he planned to file a charge concerning incidents (the subject of allegations in the instant complaint) that had occurred prior to the Gipe hearing; and that Addair did not give Rybolt any specifics on what his allegations may be, but simply expressed a speculative intention to file charges.

However, counsel for the General Counsel, Steve Robles, herein acknowledged Rybolt had expressed concerns about the effect new charges by Addair might have on the Gipe hearing, including possibly postponing the proceeding for months; and that Gipe had been out of work for almost a year. Having expressed those concerns to Judge Gross and counsel for Respondent, Rybolt elected to continue and conclude the Gipe hearing.

Counsel for the General Counsel argues that the ruling in the *Peyton Packing* case, relied on by Respondent, is not controlling because the facts therein are distinguishable from the facts in the instant case, as follows:

> 1. There are different charging parties here.
> 2. A significant difference in time-frame in that the charges in the Gipe case were filed November 2, 1988, were dismissed, appealed and reversed, and a complaint issued May 12, 1989, several months prior to the actions alleged in Addair's charge filed January 22, 1990.
> 3. Except for the bulletin board issue in the instant case, the factual circumstances and issues in the *Peyton Packing case are significantly different—Gipe's June 1988 discharge* as opposed to Addair's November 2, 1989 written warning.
> 4. Addair's written warning is an independent act which stands apart from Gipe's charges.

In support of his argument, counsel for the General Counsel cites *Maremont Corp*., 249 NLRB 216 (1980), in which the Board distinguished the facts in that case from the facts in *Peyton Packing*. In *Peyton Packing*, in which the Board held that the General Counsel may not twice litigate the alleged holding of a benefit, first as a violation of Section 8(a)(1), and again as a violation of Section 8(a)(5). However, in *Maremont*, the General Counsel sought to relitigate factual matters previously litigated under different provisions of the Act, which occurred 6 months after the latest incident litigated in the prior proceeding and cannot be considered roughly concurrent violations.

In the instant case, the conduct alleged by Addair took place in excess of 6 months after the latest incident litigated in the Gipe case, as counsel for the General Counsel notes. However, the Board in *Maremont* further stated that: ''A

[1] The above facts are not disputed and are not in conflict in the record.

more central concern, however, is that Respondent's argument, if accepted, would severely restrict the General Counsel's legitimate exercise of discretion in the expeditious litigation of outstanding unfair labor practice complaints.''

Therefore, based on the foregoing cited distinctions of facts in *Peyton Packing* from the facts in *Maremont*, I find that the General Counsel's factual distinctions are significantly different from the facts in *Peyton Packing*. Moreover, I further find on the above enumerated factual distinctions and stated reasons for Rybolt electing not to continue the proceeding or amend the complaint in the Gipe case, correct and sound. The factual comparisons in the *Peyton Packing* and the instant case are not concurrent and Rybolt's election not to continue the proceeding in the Gipe case appears to be a proper and fair exercise of discretion, in the expeditious litigation of possible outstanding unfair labor practice complaints. *Maremont*, supra.

Moreover, the General Counsel is not authorized to investigate ''potential'' unfair labor practices in the absence of a charge which raises the issues. Addair had not filed a charge with the Board at the time of the Gipe proceeding. The continuation of the hearing in the absence of a charge having been filed would open the door to unnecessary and probably prejudicial delay, while the Region and appeals processed an additional charge. *Harrison Steel Castings Co*., 255 NLRB 1426, 1427 (1981). As the Board stated in *Harrison*:

> The allegations of the instant complaint are not intertwined with those of the earlier consolidated complaints, but rather are completely separate from the prior litigation. To accept Respondent's argument that the General Counsel be compelled to litigate all unfair labor practices occurring during the pendency of litigation of other unfair labor practice charges against the same respondent would not only severely restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct. Such a result is completely at odds with the purposes and policies of the Act.

Consequently, I further find on the foregoing credited evidence, cited authority and stated reasons, that Respondent's motion to dismiss the current complaint should be denied.

C. *Respondent's Policy on Use of Employees' Bulletin Boards*

The Respondent provides and maintains six employee bulletin boards where notices by employees to employees are posted.

Since July 1, 1985, Respondent's employees' handbook provides, among other things, the following:

> *Bulletins, Handbills, and Other Printed Materials*
>
> All items to be posted on the bulletin boards marked for employee use must first be given to the Personnel Department for approval. Personnel Department staff will then post all approved items on the bulletin boards. Anyone defacing, placing, or removing items properly posted on the employees' or company's bulletin boards will be subject to disciplinary action.

Respondent's vice president, Gene McCullem, testified that Respondent usually approves notices for the employees' bulletin boards. However, he said he could recall Respondent disapproving one notice on a rock group, which was a derogatory critique, and another notice about a particular social event held in the city.

Rush Addair was employed by Respondent January 28, 1985, and at all times material, he has worked as a quality assurance person. Two weeks prior to October 24, 1989, Addair said he had requested Jill Coose to post a notice about a TV. He said the notice was posted on the bulletin boards 2 days later. However, on October 24, 1989, he went to secretary of personnel, Jill Coose, and requested her to post a union notice on the bulletin board, which he informed her was the law. The notice consisted of a union pamphlet entitled ''It's The Law!'', informing employees what foremen and supervisors cannot do.

Jill Coose told Addair ''yes,'' she thought she could post the notice on the bulletin boards and Addair left her five of the above-described pamphlets (G.C. Exh. 2), one for each of the five employees' bulletin boards, at the time.

Since the pamphlets (G.C. Exh. 2) were not posted on the bulletin boards 2 days later (October 26, 1989), Addair called Coose and asked her why the pamphlets had not been posted. She informed him that the Company's attorney had advised Respondent not to post the pamphlets, and that he (Addair) would have to talk to Vice President Gene McCullem.

Addair said he went to McCullem's office about midafternoon and asked him why he could not post the union literature on the bulletin boards; and that according to the Union and the National Labor Relations Board, he had the right to post the notice (G.C. Exh. 2). McCullem told Addair Respondent does obey the National Labor Relations Board's rules but that there were no union members at Respondent's facility. Addair left McCullem's office and went to the Regional Office and filed the present unfair labor practice charge January 23, 1990. The notices, however, were posted on all the bulletin boards about 2 months later for 7 days, as are most notices.

According to Respondent's version of the October 25 notice-posting incident, personnel manager of Respondent, David Walker, testified that Addair requested Jill Coose, the personnel clerk, to post a one-page document on the bulletin board. The clerk said she thought that she could. However, after reviewing the document, the clerk became concerned whether or not it should be posted because it was not the usual subject matter of employees' notices, but it listed 35 items with which the clerk was not familiar. The clerk consulted with Respondent's unnamed employee relations manager, who telephone Respondent's labor counsel, Jack Rogers.

The unnamed employee relations manager told Rogers that Addair desired to post ''It's The Law'' notice on the Company's (employer) bulletin boards. Rogers told the manager that the Company did not have to post the subject notice on the Company's bulletin boards. The personnel department therefore refused to post the notice in accordance with the advise of counsel (Rogers).

Because the notice was not promptly posted, Addair called the personnel clerk and asked her why it had not been posted. She told him the Company's attorney had advised the Company not to post it and that he could speak to Gene

McCullem about the posting. Addair met with McCullem that day and he was given the same response made by the personnel clerk on the attorney's advise. Addair said that according to the NLRB and UAW rules, he had the right to have the notice posted.

On January 22, 1990, Addair filed a charge which is the basis for the current proceeding. Thereafter, Addair resubmitted the notice ''It's The Law'' to the personnel clerk and it was posted by Respondent on March 4, 1990. Although Respondent Manager David Walker testified he was unaware that an unfair labor practice charge had been filed against Respondent at the time Respondent posted the notice, I am not persuaded that the latter statement is true, based on my observation of Walker's demeanor and the length of time Respondent did not post the notice.

On Monday, March 5, 1990, Personnel Manager Walker testified he was informed that employee Charles Davis had ripped down the notice and mutilated it. Davis was written up for doing so and the notice was reposted on the employees' bulletin board 9 or 10 days. Subsequently, employees' union notice (R. Exh. 9) was submitted on April 30, 1990, and posted on the employees' bulletin boards.

Conclusions

The above-described evidence raises the question whether or not Respondent discriminatorily enforced its bulletin boards policy by refusing employees the use of the employees' bulletin boards to post notices concerning the Union, in violation of Section 8(a)(1) of the Act.

In answering this question it is first noted that the Respondent does not deny it refused to post Addair's October 25, 1989 union notice to employees on the bulletin boards. In fact Respondent admits it refused to post the notice on the advise of its legal counsel, on the premise that counsel was asked and his response was in reference to posting the notice on the employer's bulletin boards. Respondent's defense for its refusal to post the notices is interesting.

Employee Rush Addair, in compliance with company policy, submitted the union notice to personnel department clerk, Jill Coose, requesting her to post it on the bulletin boards and she said she thought she could. Jill Coose did not appear and testify in this proceeding. Instead, David Walker, manager of Respondent's personnel department testified that after Coose reviewed the notices she was concerned with whether the notice should be posted on the bulletin boards. She then consulted with Respondent's employee relations manager (not named, but presumably, Remington) about posting the notice, who in turn called and inquired of Respondent's legal counsel about posting the notice on the employer's bulletin boards.

It is particularly noted here, that Addair did not request that the notices be posted on the employer's bulletin boards. He simply said the bulletin boards. Since notices from employees to employees about employees' concerns can be posted only on employees' bulletin boards, it is reasonable to conclude that Addair knew the difference in the two types of bulletin boards, and he could only have meant the employees' bulletin boards.

If clerk Coose had reviewed the notice (G.C. Exh. 2), she, as well as the Respondent's unnamed employee relations manager, would have observed on the document under the title ''It's The Law!,'' over the 35 items in bold print the following:

DO YOU KNOW?

What Foreman and Supervisors Cannot Do

It is unlawful for your employer, supervisor or foreman to interfere with, restrain or coerce employees seeking to organize or join a Union, in non-working areas, during non-working time.

A simple reading of the above headings would have vividly apprised any reader that the notice was about employee organizing concerns, and would have been obviously subject matter for the employees' bulletin boards. Certainly the notice does not suggest any subject matter that would have been posted on the Employer's bulletin boards.

However, even if clerk Coose and Respondent's unnamed employee relations manager were as naive as Walker would urge one to believe, that neither of them could determine on which bulletin boards the notice should have been posted, Respondent is also asking me to believe that legal counsel for Respondent was equally confused. It is difficult to conceive that the personnel department called Respondent's legal counsel and did not describe to him the nature of the document (G.C. Exh. 2). If the document was not described to counsel, it is understandable that he might have told Respondent it did not have to post the notice on the Employer's bulletin boards. However, it is not comprehensible (knowing what the document was about) that counsel for Respondent would not have asked about the contents of the document, and added that the subject notice should be posted on the employees' bulletin boards.[2]

Notwithstanding, even if all of Respondent's representative witnesses were in fact confused as to which bulletin boards on which the notice (G.C. Exh. 2) should have been posted, Respondent nevertheless failed and refused to post the notice on any of the bulletin boards for more than 2 months, until after the charge in the instant proceeding was filed January 22, 1990. Under these circumstances, I find that Respondent discriminatorily refused to post the notice to its employees about unionization (G.C. Exh. 2) submitted to it by an em-

[2] In evaluating this strange account of Respondent's personnel manager, David Walker, with respect to confusion about a proper subject to be posted on the employees' or the employer's bulletin boards, I am compelled to remain mindful that manager Walker is a part of management. I also noted that a considerable amount of his testimony was elicited by leading questions from Counsel for Respondent, but even so, more significant is the fact that the title and description of the document (G.C. Exh. 2) dictated it was clearly subject matter for the employees' bulletin boards and not the employer's. Walker is a well-educated management witness in charge of Respondent's personnel department, and I was not persuaded by his demeanor nor the substance of his testimony that he, personnel clerk Coose, Respondent's unnamed employee relations manager, nor Respondent's legal counsel, Rogers, was confused that Addair's notice was a subject for and was intended to be posted on the Employer's bulletin boards. Common experience discredits such an account. *H. C. Thompson*, 230 NLRB 808 (1977).

After all, counsel for Respondent is charged with knowledge of the contents of the document (G.C. Exh. 2) since he advised Respondent it did not have to post the notice on the employer's bulletin boards, and neglected to advise Respondent that the notice was a proper subject to be posted on bulletin boards for the employees.

ployee (Addair) because he was known by Respondent to be a proponent for unionization of its employees, and the notice concerned employees' concerted concerns or unionization. Most other nonunion nonconcerted activities notices to employees were generally posted on the employees' bulletin boards.

Consequently, I further find that Respondent's refusal to post the notice (G.C. Exh. 2) on the employees' bulletin boards was a discriminatory application of its bulletin boards policy, which interfered with, restrained, and coerced employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1) of the Act.

D. *Respondent's Warning to Addair*

As employees Rush Addair and Darwin Huntzinger were returning from their break at 9:10 a.m. on November 1, 1989, they testified they were discussing the recent trips of Presidents Reagan and Nixon to China. While passing the RS crib, where employee Dan Oonjai, from Taiwan works, Oonjai heard either Addair or Huntzinger make the sound of a karate man or a Ninja. Addair and Huntzinger testified that they did not know Oonjai was at the RS crib. Oonjai heard the sound and came over to the aisle where Addair and Huntzinger continued walking.

According to Oonjai, when he looked down the aisle he saw Addair several feet away pointing towards himself (his chest), which he interpreted as admitting having made the sound and questioning what he (Oonjai) was going to do about it. According to Addair, Oonjai yelled at them and when they turned around, Oonjai made no further comment or motion, so he and Huntzinger continued on to their work station. Oonjai asked Auker, who works in the RS crib, if he had heard the sound. Auker said ''yes,'' and Oonjai asked Auker to accompany him to ascertain what was Addair's problem. Auker went with Oonjai to Addair where Oonjai asked Addair if he had a problem with him (Oonjai). A brief discussion resulted which concluded with Addair telling Oonjai, ''If you don't like it in this country, why don't you go back to China.'' Oonjai replied, ''Sir, this is not your country. This country belongs to the Indians. And we [presumably, all of us] have come to this country as immigrants to the United States.'' Oonjai and Auker returned to their work areas.

When Oonjai and Auker returned to the RS crib, another worker, Wil, joined Auker in encouraging Oonjai to report the incident to his supervisor, LaNelle Provence. The supervisor told Oonjai to discuss the matter with Bill Remmington, Human Resource Manager of Respondent, where Oonjai ultimately filed a complaint alleging he felt racially harassed by Addair's statement, ''If you don't like it in this country, why don't you go back to China.'' A copy of the complaint was given to Respondent's Affirmative Action Plan Administrator, Gene McCullem, who called a meeting with Dave Whittmoyer, Greg Dykstra and Estelle Clarkson to discuss the incident with Addair. At the meeting, Addair was told that Oonjai felt that the statement ''If you don't like it in this country, why don't you go back to China,'' was a racial slur, and the Respondent agreed with him.

Respondent thereupon issued the following written warning (G.C. Exh. 7) to Addair which he was asked to read and sign, but that he did not have to sign it if he did not agree it was true:

> Warning-Harassment dated 11/2/89.
>
> The situation being documented occurred on 11/1/89 between 9 and 9:30 a.m. when Rush Addair made fun of Dan Oonjai's race. Dan and witness, Gerald Auker confronted Rush about this harassment and Rush responded by saying ''Why don't you go back to China, if you don't like America.''
>
> Since Dan Oonjai, an oriental minority stated this was not the first harassment incident, and since there was a witness, Rush is being given a written warning. This is a violation of Best Lock Corp's. Affirmative Action Plan and will not be condoned. Further violation of any racial nature will result in more severe discipline and could result in termination.
>
> Addair denies on 11/2/89 that he made any statement making fun of Oonjai's race.
>
> Witnessed: E. Clarkson, G. Dykstra, D. Whittmoyer, and signed by Rush Addair 11/2/89.

Initially, Addair refused to sign the warning because the statement attributed to him, ''If you don't like it in this country, why don't you go back to China,'' was not correct. Addair said he said ''Why don't you go back to China if you don't like America?'' Manager McCullem changed the wording of the statement according to Addair's version, and asked Addair if the statements in the warning were now true. Addair said yes and signed the warning (G.C. Exh. 7). As the meeting concluded, Addair asked if he could submit evidence supporting his side of the conversation and he was told that he could do so.

On the next day, November 3, 1989, Addair presented McCullem with three ''NCRs'' (statements by himself, and two other persons) to be included in his personnel file with the warning. In his own statement (G.C. Exh. 4), Addair denied making fun of Oonjai but he did not deny making the statement about ''Go back to China.'' In the statement by Darwin Huntzinger, the latter said he did not hear Addair say anything to Oonjai and he (himself) did not say anything to Oonjai about his race, but said he was the person who, just acting stupid, made the karate sound. Cindy Skillman's statement (G.C. Exh. 6) denies hearing Addair saying anything other than he (Addair) had nothing to say and asked Oonjai to leave the area. Neither Huntzinger's nor Skillman's statement mentioned the ''Go back to China'' conversation, although they were supposed to have been present. All three statements were included in Addair's personnel file.

Analysis and Conclusions

The record evidence shows that Thirdsak Oonjai from Thailand has been in the United States 17 years, that he is a permanent resident here, and has worked for Respondent 10 years (currently a receiving clerk).

The question raised by the evidence and presented for determination is whether or not Respondent's November 2, 1989 written warning to Rush Addair was issued because of his union activities including his efforts to have the notice posted on the employees' bulletin boards, of which facts Respondent was fully aware.

In analyzing the credited evidence of record in an effort to answer the question presented for determination, one must remain mindful that Respondent's employees have never been unionized, and that Respondent has unlawfully refused to post Addair's organizing notice to employees on the bulletin boards until after the charge in the instant case was filed. With these factors in mind, Respondent's objectively in hearing and disposing of Oonjai's November 1 complaint against Addair must be carefully examined to determine whether Respondent's issuance of a warning to Addair was in any way motivated by Addair's union activities.

Counsel for the Respondent urges application of the *Wright Line* doctrine, 251 NLRB 1083, 1089 (1980), in the instant case, because the General Counsel must first establish that an unfair labor practice has been committed by a ''preponderance of the testimony.'' Assuming *Wright Line* is applicable to the question presented here, it is clear that the General Counsel has established that Respondent interfered with, restrained, and coerced its employees in the exercise of their protected Section 7 rights, by refusing to post the union literature on its employees' bulletin boards, in violation of Section 8(a)(1) of the Act.

Counsel for Respondent also argues that the General Counsel must make a prima facie showing sufficient to support an inference that the protected conduct (refusing to post the notice on the bulletin boards) was a motivating factor in Respondent's decision to issue the November 1 warning to Addair; that Respondent's knowledge of Addair's union activity is not enough, but the General Counsel must show that issuance of the warning was motivated by Respondent's union animus, *Transportation Management Corp*., 462 U.S. 401–402 (1983); *NLRB v. Brown & Root*, 380 U.S. 278, 286 (1965); and that Respondent has not violated the Act if animus did not contribute at all to an otherwise lawful discharge for good cause.

Seriously considering Respondent's legal argument whether Respondent's November 1 written warning to Addair was motivated by Addair's union activity, I am persuaded by the evidence that the latter question can best be determined by determining whether the warning was lawfully issued ''for good cause.'' Analyzing the evidence in this regard, it is first noted that according to the testimony to Gerald Auker, on a prior occasion, he and Addair were discussing the Chinese student demonstrations. Addair said the demonstrations was a ''Chinese'' problem and America should not go over there or do anything about it. Oonjai entered the conversation but Auker does not describe what Oonjai said.

When Oonjai went to the aisle on November 1, 1989, to investigate the source of the Karate sound (Ashoo!) and called to Addair and Huntzinger, who were walking down the aisle, Addair turned and pointed towards his chest. Oonjai interpreted Addair's pointing towards his chest as having acknowledged making the Karate sound and challenging him. However, since Oonjai called to Addair and Huntzinger, by pointing to himself, Addair could have been asking was Oonjai calling him. In any event, after Oonjai, accompanied by Auker approached and confronted Addair and Huntzinger, Addair denied he made the Karate sound. During the heated discussion, Huntzinger told Oonjai and Auker that he (Huntzinger) had made the Karate sound while just being stupid, and with no inference or connotation to Oonjai. As the confrontation concluded, Addair acknowledged that he asked Oonjai ''why don't you go back to China if you don't like America.''

When Oonjai brought the incident to the attention of management and Affirmative Action Plan Administrator, Gene McCullem, the latter and three other members of management met with Addair. McCullem told Addair Oonjai felt that his (Addair) ''back to China'' statement was a racial slur, and that management agreed with him.

As related above, Respondent contends McCullem issued the written warning to Addair solely for telling or asking Oonjai ''why don't you go back to China if you don't like America.'' Even though Addair submitted to McCullem the signed statements of Huntzinger denying that Addair said anything to Oonjai and acknowledging that he (Huntzinger) had made the Karate sound; and the statement by Cindy Skillman, that she did not hear Addair say anything to Oonjai other than he had nothing to say and ask Oonjai to leave the area, Respondent did not rescind its written warning to Addair.

It is particularly noted that Respondent's stated reason for issuing the November 2 warning to Addair was because during the exchange between Addair and Oonjai, Addair asked Oonjai, ''Why don't you go back to China if you don't like America.'' Respondent considered that remark a racial slur. Although Oonjai stated Addair had made similar remarks to him on previous occasions, neither Oonjai nor any other witness for the Respondent testified about the nature or description of such remarks. Here, however, Addair admitted making the ''Go back to China'' statement and neither Huntzinger nor Skillman denied or mentioned the remark in their signed statements.

As counsel for Respondent argues, the action for which Respondent issued Addair the warning is totally independent of any Union or concerted activity in which Addair was engaged. The Respondent was able to show by record evidence that it has disciplined employees for any conduct which resembles racial or sexual harassment of employees. Respondent agreed with Oonjai that Addair's remark ''why don't you go back to China if you don't like America'' was an ethnic affront, which need not be tolerated among its work force, where it is trying to create and maintain interethnic harmony in the workplace through enforcement of its affirmative action program.

The General Counsel's evidence fails to establish any nexus between Respondent's refusal to post Addair's union literature, or any other union or concerted activity in which Addair was engaged, and Addair's ''Go back to China'' remark to Oonjai on November 1. The complaint of racial harassment was filed by employee Oonjai. Respondent investigated the incident, *accepted Addair's own version of the remark*, which Addair acknowledged making and signing. Under these circumstances, the General Counsel's evidence fails to show how Respondent's warning to Addair was in any was motivated by Addair's union activity. In fact, Respondent's evidence has shown that Addair would have been disciplined for his remark to Oonjai even if Addair had not been previously engaged in protected Union or considered activity. This fact is demonstrated by Respondent's evidence of having disciplined other employees for statements or acts of racial or sexual harassment.

The mere statement ''Why don't you go back to China if you don't like America,'' appears to be nonoffensive without

any negative ethnic or nationality overtones. However, when the statement is considered in the context of the heated discussion between Addair and Oonjai on November 1, 1989, about a Karate sound which Oonjai was suspected was made by Addair, and to which Oonjai took offense, the import of the statement takes on a negative ethnic character. Specifically, Oonjai has been in this country 17 years. He is a legal resident here, and has been in Respondent's employ 10 years. For Addair to conclude a heated dispute between himself and Oonjai by telling him ''why don't you go back to China if you don't like America,'' highlighted Oonjai's ethnic or nationality difference in an unwelcome and negative sense. Such a result appears to be the very kind which the Respondent's affirmative action plan seeks to avoid in human relations among its employees. *Transportation Management Corp*., 462 U.S. 393 401–402 (1983); *NLRB v. Brown & Root*, 380 U.S. 278, 286 (1965); *Wright Line*, supra 251 NLRB at 1089.

I therefore conclude and find upon the foregoing credited evidence, reasons and cited legal authority, that General Counsel's evidence fails to establish that Respondent's November 2 written warning to Addair was motivated by Respondent's union animus, or the known protected conduct of Addair (union activity or his request to post the notice). Such conduct by the Respondent does not violate the Act. Consequently, paragraphs 6(a) and (b) of the complaint should be dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily refused to post a union notice on the employees' bulletin boards as requested by an employee, Respondent has interfered with, restrained, and coerced its employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct and that it take certain affirmative action necessary to effectuate the policies of the Act.

CONCLUSION OF LAW

By discriminatorily refusing to post a Union notice on the employees' bulletin boards pursuant to the request of an employee, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Best Lock Corporation, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to post notices requested to be posted on the employees' bulletin boards by employees concerning their concerted or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the facility of Best Lock Corporation, 6161 E. 75th Street, Indianapolis, Indiana, copies of the attached notice marked ''Appendix.''[4] Copies of said notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their protected Section 7 rights by discriminatorily refusing to post on the employees' bulletin boards, notices concerning union or concerted interests of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

BEST LOCK CORPORATION